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No. 15-5991

In The Supreme Court of the United States

LAWRENCE EUGENE SHAW,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF FOR THE PETITIONER

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QUESTION PRESENTED

Whether, for purposes of clause (1) of the bank-fraud statute, 18 U.S.C. § 1344, knowingly executing a scheme "to defraud a financial institution" requires proof of an intent to deceive and cheat a bank – in other words, that the defendant's objective in devising the scheme was to obtain bank-owned property by deceiving that victim bank.

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BRIEF FOR THE PETITIONER

Petitioner Lawrence Eugene Shaw respectfully requests that the Court reverse the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINION BELOW

The opinion of the court of appeals is published at *United States v. Shaw*, 781 F.3d 1130 (9th Cir. 2015). J.A. 40-55. The district court issued no relevant written decisions.

JURISDICTION

The court of appeals entered its judgment on March 27, 2015. J.A. 40. On June 8, that court denied Shaw's timely petition for rehearing en banc. J.A. 56. Shaw then filed a timely petition for a writ of certiorari on September 4, which this Court granted on April 25. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISION

18 U.S.C. § 1344 provides:

> Whoever knowingly executes, or attempts to execute, a scheme or artifice –
>
> (1) to defraud a financial institution; or

> (2) to obtain any of the moneys, funds, credits, assets, securities, or other property owned by, or under the custody or control of, a financial institution, by means of false or fraudulent pretenses, representations, or promises;
>
> shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both.

STATEMENT OF THE CASE

Lawrence Shaw was convicted of bank fraud under 18 U.S.C. § 1344(1), which requires the intent to defraud a financial institution. J.A. 12-17, 26-27, 42. The indictment alleged that he executed a scheme to defraud Bank of America ("BofA") and Washington Mutual Bank ("WaMu") by engaging in specified financial transactions involving those banks and PayPal, an online payment and money-transfer service. J.A. 12-16, 42: R. 349.[1] The target of Shaw's scheme was Stanley Hsu, who had an account with BofA. J.A. 13. Shaw has never disputed that he deceived BofA and WaMu as part of his scheme to get Hsu's money via PayPal.[2] The issue in this case is whether the intent to deceive a bank was enough to convict Shaw under § 1344(1) or

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[1] "R." refers to the appellant's excerpts of record electronically filed in the court of appeals on October 16, 2013 (Docket No. 8).

[2] PayPal is not a "financial institution" for purposes of § 1344. R. 377. *See* 18 U.S.C. § 20 (defining "financial institution").

whether the government also had to prove that he intended to take bank-owned property by deceiving that victim bank.

I. Factual Background.

Stanley Hsu lived in Taiwan but had the statements for his BofA account mailed to a California home where Shaw happened to reside. J.A. 44; R. 322-26, 343-44, 581-85, 588. Using the information in these statements, Shaw devised and implemented a scheme to obtain Hsu's money. J.A. 44.

First, Shaw created a Hsu email account and used it to open a PayPal account in Hsu's name. J.A. 44; R. 327-29, 349-50, 358, 377-78, 524-25. Shaw then linked that PayPal account to Hsu's BofA account, which he accomplished despite PayPal's security measures because he had access to the bank statements. J.A. 44; R. 354-56, 378. Shaw also opened accounts in his father's name at WaMu. J.A. 44-45; R. 497, 589. He linked some of these accounts to the Hsu PayPal account. J.A. 45; R. 356-57. Although PayPal flagged that as suspicious, Shaw convinced PayPal that he was Hsu by providing falsified documents. J.A. 45; R. 357-60, 379-81, 512-14.

With these tools in place, Shaw siphoned Hsu's money from his BofA account through outgoing transfers to the PayPal account. J.A. 45; R. 361, 378-79, 495-97. Shaw then made purchases using the PayPal account; he also moved the PayPal money through the WaMu accounts in his father's name before ultimately

writing checks to himself, transferring funds to another WaMu account in his own name, or otherwise using the money for his benefit. J.A. 45-46; R. 361-65, 402-07, 436-38, 497-510. Shaw took about $300,000 of Hsu's money over four months before his scheme was discovered. J.A. 46; R. 326, 336, 342, 497

It was undisputed at trial that neither BofA nor WaMu lost any money because of Shaw's scheme. J.A. 46; R. 434-35, 573-74, 615. Pursuant to standard bank policies, BofA returned to Hsu the money taken by Shaw in the 60 days before Hsu reported the unauthorized withdrawals. J.A. 46; R. 336-40, 614-15. But the source of these funds was PayPal, which had to "auto-reverse" those money transfers back to BofA. J.A. 46; R. 387-89, 392-95, 573-74, 613-15.[3] Even if BofA had sought additional auto-reversals from PayPal for withdrawals outside of the 60-day period, the source of any funds thereby returned to Hsu would also have been PayPal, not BofA. R. 388-89, 392-93.

As for WaMu, it would have reimbursed a customer for unauthorized activity reported within two months if the customer was a "true victim." R. 426-30, 445. Because its only affected customer (Shaw) was not a victim, WaMu returned the limited ill-gotten funds still in Shaw's fraudulent accounts to PayPal, but the bank did not compensate PayPal (or anyone else) for the money already disbursed from those accounts. R.

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[3] Given that the source of the money returned to Hsu via BofA was PayPal, the Ninth Circuit described the "auto-reversals" inaccurately as "reimburse[ments]." J.A. 46.

389-90, 434-35. And because PayPal is not a bank, it could not seek auto-reversals from WaMu. R. 389-91.

Thus, Hsu and PayPal bore the entire loss caused by Shaw's scheme. J.A. 46; R. 336-39, 387, 389, 391-92, 434-35, 561-62, 573-74, 615.

II. The District Court Proceedings.

The bank-fraud statute, 18 U.S.C. § 1344, defines two crimes: clause (1) prohibits knowingly executing a scheme "to defraud a financial institution," and clause (2) applies to a scheme to obtain property "owned by, or under the custody or control of, a financial institution" by means of a false statement. Shaw was charged with violating clause (1). J.A. 12-16.

Shaw asked the district court to instruct the jury that the requisite intent to defraud existed if he intended to both deceive a bank *and* cheat that bank by exposing that bank, not just Hsu, to monetary loss. J.A. 22-25, 47. He also asked the court to instruct that the jury could convict only if it found that a particular bank was both the target of his deception and an intended victim of the fraud. J.A. 23-24, 47. Shaw acknowledged that actual bank loss is not an element of bank fraud, but he maintained that an *intent* to cause bank loss is required to establish an intent "to defraud a financial institution" for purposes of clause (1). R. 624-25.

Shaw did not dispute that he devised and implemented the above-described scheme, or that his

scheme would constitute bank fraud under clause (2) of § 1344. R. 315, 410, 631, 644, 646. Rather, his defense was that, given the distinct crimes covered by § 1344's two provisions, his scheme did not constitute bank fraud under clause (1). R. 624-25, 642-51. He therefore moved for a judgment of acquittal on those grounds. R. 610, 622-24.

The district court acknowledged that Shaw's motion for a judgment of acquittal and his requested jury instructions hinged on his interpretation of § 1344(1). R. 622-26. Because it rejected that interpretation, the district court refused to give Shaw's instructions. J.A. 48; R. 636-41, 648-51. Instead, it told the jury that "'scheme to defraud' means any deliberate plan of action or course of conduct by which someone intends to deceive, cheat, *or* deprive a financial institution of something of value." J.A. 18 (emphasis added); *see also* J.A. 48; R. 725. Consistent with this disjunctive definition of the "scheme," the court also defined "intent to defraud" disjunctively in a separate instruction as "intent to deceive *or* cheat." J.A. 19 (emphasis added); *see also* J.A. 49; R. 726.

The jury convicted Shaw on 14 counts of § 1344(1) bank fraud. J.A. 49; R. 737-40.[4]

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[4] The indictment alleged 17 counts of clause (1) bank fraud. J.A. 12-16. The government dismissed one count before trial. R. 163. And the jury acquitted on two counts pertaining to transactions that were not clearly traceable to the fraudulent scheme. R. 703-04, 739-40.

III. The Court of Appeals' Decision.

On appeal, the Ninth Circuit noted the significant differences between the instructions requested by Shaw and those given by the district court, including that Shaw argued that "intent to defraud" means "intent to deceive *and* cheat" the bank whereas the district court instructed the jury that it means "intent to deceive *or* cheat" the bank. J.A. 42-43, 46-49 (emphasis added). The court affirmed Shaw's convictions under the disjunctive instructions. J.A. 44, 55.

The Ninth Circuit identified the question as whether the intent to defraud the bank required under § 1344(1) "means the government must prove the defendant intended the bank to be the principal financial victim of the fraud." J.A. 42. It acknowledged that bank *customer* Stanley Hsu – not a bank – was a, if not the, principal intended financial victim of Shaw's scheme. J.A. 42-43, 51.

The Ninth Circuit rejected Shaw's argument that § 1344(1) requires proof that the defendant intended the bank to be the financial victim of the fraud (in other words, the intended bearer of the loss). J.A. 51. "The language of neither clause of the statute," the court wrote, "refers to monetary loss or to the risk of such loss." J.A. 51. Rather, the statute's "language focuses on the intended victim of the deception, not the intended bearer of the loss." J.A. 51. The court then explained that clause (1) requires the intent to deceive the bank and clause (2) requires false or fraudulent representations or pretenses to third parties, but

"[n]either clause requires the government to establish the defendant intended the bank to suffer a financial loss." J.A. 51. Although it acknowledged that the circuits are divided on how to interpret the statute, the Ninth Circuit relied on its precedent to hold that "§ 1344(1)'s element of intent 'to defraud' . . . does not include intent to financially victimize the bank." J.A. 43, 51-54. The court did not define "defraud" in general, or "defraud a financial institution" in particular, before reaching this conclusion. J.A. 49-55.

The Ninth Circuit believed that its holding was consistent with this Court's decision in *Loughrin v. United States*, 134 S. Ct. 2384 (2014), which interpreted clause (2) of § 1344. J.A. 43-44, 49-51, 53-55. The court of appeals wrote that *Loughrin* confirmed its "conclusion that the difference between the two clauses is which entity the defendant intended to deceive, not which entity the defendant intended to bear the financial loss." J.A. 53. The court also pointed to *Loughrin*'s rejection of a risk-of-loss element. J.A. 54 (citing *Loughrin*, 134 S. Ct. at 2395 n.9). In doing so, however, the Ninth Circuit improperly characterized the *actual*-risk-of-loss element at issue in *Loughrin* as "similar" to Shaw's entirely distinct *intent*-to-cause-loss argument. J.A. 53-55.

Given its interpretation of § 1344(1), the Ninth Circuit held that the district court correctly refused Shaw's request for an instruction that "intent to defraud" means "intent to deceive *and* cheat." J.A. 47 (emphasis added), 55. It found no error in the district court's contrary instruction that "[a]n intent to defraud

is an intent to deceive *or* cheat." J.A. 49 (emphasis added), 55. Indeed, that is the court's *model instruction* defining "intent to defraud." *Ninth Circuit Manual of Model Criminal Jury Instructions* § 3.16 (2010 ed.).

SUMMARY OF ARGUMENT

The federal bank-fraud statute, 18 U.S.C. § 1344, defines different, though overlapping, crimes in two separate clauses. The Court construed clause (2) of the statute in *Loughrin v. United States*, 134 S. Ct. 2384 (2014). This case concerns clause (1), which punishes knowingly executing a scheme or artifice "to defraud a financial institution[.]"

Lawrence Shaw was convicted of clause (1) bank fraud based on a scheme to take a bank customer's money from his account by deceiving banks. Unlike clause (2), clause (1) requires, as its "whole sum and substance," that a defendant intend to "defraud a financial institution[.]" *Loughrin*, 134 S. Ct. at 2389-90. The question here is what that element means.

I. This question is answered by clause (1)'s text. Intent to defraud a financial institution requires that the defendant's objective in devising the scheme be to deceive and cheat a bank – that is, to obtain a bank's *own* property by deceiving that bank. It is not enough that the defendant intend to obtain non-bank property in the custody and control of the bank, such as bank-customer money. This plain-meaning interpretation is confirmed by § 1344's structure and legislative history.

A. The Ninth Circuit's decision is at odds with the plain language of clause (1).

A.1. The gravamen of the crime is the scheme "to defraud" itself, and thus the defendant's intent in devising the scheme, rather than the completed fraud. In over a century of jurisprudence, this Court has interpreted "defraud" in accordance with its common and ordinary meaning to signify wronging a victim *in his property rights* by deceit. In contravention of this settled meaning, which Congress is presumed to have employed, the Ninth Circuit affirmed Shaw's convictions under jury instructions that failed to require proof of an intent to deprive a bank (or anyone else) of a property right.

A.2. Clause (1) applies only to schemes to "defraud *a financial institution*." The statute thus textually specifies the requisite intended victim of the scheme – a bank – unlike the mail- and wire-fraud statutes on which it was modeled. Basic grammar rules dictate that the settled definition of the verb "defraud" applies to the direct object of that verb ("a financial institution"). Clause (1) therefore requires an intent to wrong a bank *in its property rights* by deceiving that bank. This Court has construed similar statutory language designating the requisite victim of a fraudulent scheme to require that the defendant target that victim *itself*, and not a third party. The same analysis applies here. Contrary to the Ninth Circuit's conclusion, clause (1)'s unambiguous text applies only to schemes designed to obtain the bank's *own* property.

B. Read as a whole, the bank-fraud statute's two provisions have notable textual differences that support the plain-meaning interpretation of clause (1). Clause (2) lacks clause (1)'s intent-to-defraud-a-bank requirement and differentiates expressly between schemes designed to obtain bank-*owned* and bank-*held* property, extending its reach to both types of schemes (provided the requisite means of a false statement). This broad language makes clause (2) applicable to a range of property interests present in banking relationships. A scheme, like Shaw's, designed to obtain money in a customer's account targets property under the "custody or control" of the bank and is covered by clause (2). Because it is not a scheme to obtain bank-owned property, it is not covered by clause (1).

Clause (1) dispenses with clause (2)'s false-statement requirement and is conspicuously devoid of its breadth as to the property schemes described. No basis exists for reading clause (2)'s text explicitly covering schemes to obtain bank-held property into clause (1). Rather, interpreted in accordance with its plain language, § 1344 is coherent and comprehensive in sweep.

C. Because the text is clear and the statutory scheme is coherent, the Court need not consider § 1344's history. Nonetheless, that history supports the plain-meaning interpretation of clause (1).

C.1. Section 1344 was enacted following three decisions of this Court that exposed gaps in the legislative scheme for prosecuting particular crimes against banks. Check kiting – which misleads banks to

obtain their money – was a major concern, as were stolen-credit-card schemes and certain bank-larceny offenses. These crimes map onto the plain-meaning interpretation of § 1344. Check kiting is the quintessential clause (1) crime, and the latter types of schemes are covered most clearly under clause (2). It is consistent with Congress's focus on check kiting that it devoted clause (1) to the protection of banks from schemes that unambiguously target bank-*owned* property.

C.2. Legislative pronouncements also reflect Congress's intent to adopt the Court's jurisprudence interpreting "scheme or artifice to defraud" and to protect banks from schemes in which the bank *itself* is the financial victim of the fraud. Moreover, in conjunction with clause (2)'s different, broad language covering two types of property schemes, the plain-meaning interpretation of clause (1) comports with § 1344's purpose to reach a wide range of bank fraud.

D. Applying the rule of lenity, the Court has construed other federal fraud statutes narrowly. Therefore, to the extent there is any ambiguity concerning the scope of clause (1), the Court should do the same here.

II. Clause (1) applies only to schemes to obtain bank-owned property by deceiving that bank, and clause (2) covers schemes to obtain bank-owned or bank-held property by means of a false statement. Interpreted this way, any conduct that constitutes true

bank fraud will be chargeable, and provable, under § 1344.

If a defendant intends to obtain bank-owned property by deceiving that bank, and does so by means of a false statement to the bank, he can be charged under either clause (1) or clause (2) (or both). Other crimes, like check kiting, can only be brought under clause (1). But the requisite intent for clause (1) is clear in check-kiting cases because such schemes unambiguously target a bank's own property. The same is true for loan fraud and bank embezzlement. In contrast, where a scheme does not reflect an intent to obtain bank-owned property, but targets bank-held property, the defendant may be prosecuted under clause (2) instead.

Had the government followed the appropriate course by charging Shaw under clause (2), its task would have been straightforward. But where, as here, the government charges a clause (2) scheme under clause (1), it *invites* a higher evidentiary burden. Given clause (2), there is no need to stretch clause (1) beyond its plain meaning – even if the Court were permitted to do that.

ARGUMENT

The federal bank-fraud statute, 18 U.S.C. § 1344, criminalizes the knowing execution, or attempted execution, of two kinds of schemes:

> [A] scheme or artifice –
>
> (1) to defraud a financial institution; or
>
> (2) to obtain any of the moneys, funds, credits, assets, securities, or other property owned by, or under the custody or control of, a financial institution, by means of false or fraudulent pretenses, representations, or promises[.]

The Court recently interpreted this statute in *Loughrin v. United States*, 134 S. Ct. 2384 (2014), which addressed whether clause (2) requires proof that the defendant intended to defraud a financial institution. *Id.* at 2387. The Court held that it does not. *Id.* The statute's two clauses define separate, though overlapping, crimes. *Id.* at 2388-92 & n.4. It is clause (1), not clause (2), that requires proof of intent to defraud a financial institution – indeed, that is its "whole sum and substance." *Id.* at 2389-90.

Lawrence Shaw was convicted of clause (1) bank fraud, and this case concerns what it means to intend to "defraud a financial institution" for purposes of that provision. The Ninth Circuit affirmed his convictions under instructions that defined intent to defraud as "intent to deceive *or* cheat" a financial institution, thereby permitting a guilty verdict based solely on an intent to deceive a bank. J.A. 49 (emphasis added), 55. Moreover, it held that the requisite intent to defraud does not include "intent to financially victimize the bank." J.A. 43, 51-55.

The Ninth Circuit's decision is at odds with the text of the statute. A defendant has the intent required by clause (1) only if his objective in devising the scheme is to obtain a bank's *own* property – not that of a non-bank third party – by deceiving that bank. Construed in this manner, clause (1) complements clause (2), such that any conduct properly characterized as bank fraud will be covered by § 1344.

I. Under clause (1) of the bank-fraud statute, 18 U.S.C. § 1344, the requisite intent "to defraud a financial institution" means the intent to deceive and cheat a bank – in other words, that the defendant's objective in devising the scheme to defraud was to obtain bank-owned property by deceiving that victim bank.

The plain language of clause (1) requires proof that the defendant intended to deceive and cheat a bank.[5] Put differently, the defendant's objective in devising the scheme to defraud must be to obtain bank-owned property by deceiving that victim bank.[6] The

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[5] Section 1344 uses the term "financial institution," which is defined to include a variety of institutions, including FDIC-insured banks. 18 U.S.C. § 20. Here, "bank" is used as shorthand for "financial institution."

[6] As explained in the Statement of the Case, Shaw's scheme targeted funds in a bank customer's account, so the only property at issue here is money. The scheme involved neither "intangible property" nor the kind of "honest services" fraud covered by 18 U.S.C. § 1346, as interpreted by *Skilling v. United States*, 561 U.S. 358 (2010). Therefore, for present purposes, the scheme to defraud

structure of § 1344, which defines two separate crimes and distinguishes, in clause (2), between two kinds of property, supports this interpretation of clause (1). And the statute's legislative history, to the extent that it is relevant, buttresses the plain-language construction. Finally, if any ambiguity remains, the rule of lenity requires construing clause (1) in defendants' favor.

A. The plain text of clause (1) requires the intent to deceive a bank and to target that bank's property.

Statutory interpretation begins with the text. *Ross v. Blake*, ___ S. Ct. ___, 2016 WL 3128839, *5 (2016). Here, the relevant language is "scheme or artifice . . . to defraud a financial institution[.]" 18 U.S.C. § 1344(1).[7] The gravamen of the crime is the scheme

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is defined as a scheme to obtain bank-owned *property* by deceiving that bank.

[7] The text at issue here has not changed materially since § 1344 was enacted. Originally, the statute included two subsections. Subsection (a) contained the core text of the current statute, except it used the phrase "a federally chartered or insured financial institution" instead of "a financial institution," as it does now. Subsection (b) defined "a federally chartered or insured financial institution." Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, Title II, § 1108(a), 98 Stat. 1837, 2147. Later, Congress designated subsection (a) as the entire statute, replaced "federally chartered or insured financial institution" with "financial institution," eliminated subsection (b), and changed the maximum penalties. Financial Institutions Reform, Recovery, and Enforcement Act of 1989, Pub. L. No. 101-73, Title IX, § 961(k), 103 Stat. 183, 500. The same act added 18 U.S.C. § 20, which now defines "financial institution." *Id.* § 962(e), 103 Stat. 503-04. The following year, Congress once again increased the penalties in § 1344. Crime

itself, not the completed fraud. *Loughrin*, 134 S. Ct. at 2395 n.9 (citing *Neder v. United States*, 527 U.S. 1, 25 (1999)).[8] Thus, the scheme's objective – the defendant's intent – is the crux of clause (1). *Id.* at 2389-90.[9]

To determine how to define the requisite intent, the Court must therefore consider what constitutes a scheme to defraud a bank. The Court has long interpreted "defraud" consistent with its common and ordinary meaning to signify wronging a victim in his *property rights* by deceit. The term's focus on the victim's property rights is important because clause (1) applies only to schemes to "defraud *a financial institution*." Given this textual specification of a particular victim – the bank – basic rules of grammar require applying the settled definition of "defraud" to that specific victim. It follows that a scheme to defraud a bank is a scheme to obtain the intended victim bank's *own* property by deceiving that bank.

Control Act of 1990, Pub. L. No. 101-647, Title XXV, § 2504(j), 104 Stat. 4789, 4861. There have been no other amendments to the statute.

[8] Given the focus of § 1344 on the *scheme* rather than the completed fraud, the government need not prove actual damages, or risk of financial loss, under either clause. *See Loughrin*, 134 S. Ct. at 2395 n.9 (citing *Neder*, 527 U.S. at 24-25). Consequently, clause (1), like clause (2), "avoid[s] entangling courts in technical issues of banking law about whether the financial institution or, alternatively, a depositor would suffer the loss from a successful fraud." *See id.* It is the *object* of the scheme described in each part of § 1344 – not whether a bank in fact owns the property or suffers a loss – that controls whether a case is properly brought under clause (1) or clause (2).

[9] "Scheme" is used as shorthand for "scheme or artifice."

1. The Court has interpreted "defraud" to mean wronging a victim in his property rights by deceit.

Section 1344 was enacted in 1984. Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, Title II, § 1108(a), 98 Stat. 1837, 2147. It was modeled on the mail- and wire-fraud statutes (18 U.S.C. §§ 1341, 1343). *Loughrin*, 134 S. Ct. at 2391; *Neder*, 527 U.S. at 20-21. But the scheme-to-defraud language found in clause (1) predates those statutes. It first appeared in the 1872 predecessor to the mail-fraud statute. Act of June 8, 1872, ch. 335, § 301, 17 Stat. 283, 323.[10] In over a century of jurisprudence interpreting § 1344's predecessor statutes, the Court has construed "defraud" consistent with its common and ordinary meaning to signify wronging a victim in his property rights by deceit. The settled meaning of this term applies here.

Congress enacted the original mail-fraud statute to protect "property rights" from frauds undertaken "'for the purpose of deceiving *and fleecing*'" innocent people. *McNally v. United States*, 483 U.S. 350, 356 & n.5 (1987) (quoting Cong. Globe, 41st Cong., 3d Sess., 35 (1870) (remarks of Rep. Farnsworth)) (emphasis added); *see also Durland v. United States*, 161 U.S. 306, 314 (1896) (mail-fraud statute's purpose was protection of public against "intentional efforts *to despoil*" by

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[10] This statute made it a misdemeanor for "any person having devised or intending to devise any scheme or artifice to defraud" to use the mail in "executing such a scheme or artifice (or attempting so to do)[.]" *Id.*

use of mail) (emphasis added). Consistent with this purpose, when the Court first interpreted the statute, it construed the phrase "scheme or artifice to defraud" "broadly insofar as property rights are concerned[.]" *McNally*, 483 U.S. at 356 (discussing *Durland*).

Subsequently, in *Fasulo v. United States*, 272 U.S. 620 (1926), the Court held that a scheme to obtain money by threating to injure or kill the victim was not a scheme to defraud for purposes of the mail-fraud statute because the property was obtained from the victim by intimidation. *Id.* at 627-29. In so holding, the Court applied the common meaning of "defraud," as set forth in *Hammerschmidt v. United States*, 265 U.S. 182 (1924), which stated that the term ordinarily signifies "the deprivation of something of value by trick, deceit, chicane, or overreaching" or, put differently, "wronging one in his property rights by dishonest methods or schemes." *Id.* at 188;[11] *see also United States v. Cohn*,

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[11] *Hammerschmidt* concerned the scope of the predecessor of 18 U.S.C. § 371, which prohibits any conspiracy "to defraud the United States, or any agency thereof in any manner or for any purpose[.]" The Court held that while "[t]o conspire to defraud the United States means primarily to cheat the Government out of property or money it also means to interfere with or obstruct one of its lawful governmental functions by deceit, craft or trickery, or at least by means that are dishonest." *Id.* The Court later concluded "that this broad construction of § 371 is based on a consideration not applicable to the mail fraud statute" – namely, that § 371 is a statute designed to protect the federal government, which exists to administer itself in the interest of the public. *McNally*, 483 U.S. at 358 n.8. Because the mail-fraud statute had its origin in the desire to protect individual property rights, by contrast, any benefit "the Government derives from the statute

270 U.S. 339, 346 (1926) ("primary sense" of "defraud" is "cheating" victim "out of property or money"). Based on *Hammerschmidt*'s ordinary-meaning definition of "defraud," the Court agreed that the words "to defraud" "*show unmistakably that the victim's money must be taken from him by deceit.*" *Fasulo*, 272 U.S. at 627-28 (citing with approval *Naponiello v. United States*, 291 F. 1008, 1009 (7th Cir. 1923)) (emphasis added).

Congress enacted § 1344 after a trio of decisions by this Court left gaps in the legislative scheme for punishing frauds against banks. *See infra* Part I.C.1. A few years later, in *McNally v. United States*, the Court held that "scheme or artifice to defraud" did not encompass schemes to defraud the people of their intangible right to honest and impartial government. 483 U.S. at 358-60. Applying *Hammerschmidt*'s definition of "defraud" once again, the Court underscored that the common meaning of "defraud" refers "to *wronging one in his property rights* by dishonest methods or schemes[.]" *Id.* at 358 (internal quotation marks omitted) (emphasis added). Nothing in the statute's history or text supported extending its reach to crimes other than "frauds involving money or property." *Id.* at 358-60.[12]

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must be limited to the Government's interests as property holder." *Id.*

[12] Congress responded to *McNally* by enacting 18 U.S.C. § 1346, which defines "scheme or artifice to defraud" for purposes of the federal fraud statutes to include "a scheme or artifice to deprive another of the intangible right of honest services." Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, Title VII, § 7603(a), 102 Stat. 4181, 4508. But even after that, the Court interpreted this statute narrowly to "criminalize *only* the bribe-and-kickback

Thereafter, the Court continued to apply *Hammerschmidt* to interpret the scheme-to-defraud language and to reaffirm *McNally*'s holding that, construed in accordance with its common and ordinary meaning, the phrase is limited to the protection of property rights. *See Cleveland v. United States*, 531 U.S. 12, 15, 19-20 (2000) (mail-fraud statute did *not* apply to scheme to obtain a state license because "the thing obtained must be property in the hands of the victim"); *Carpenter v. United States*, 484 U.S. 19, 25-27 (1987) (mail- and wire-fraud statutes applied to confidential business information because such information "has long been recognized as property"); *see also Pasquantino v. United States*, 544 U.S. 349, 354-57 (2005) (wire-fraud statute applied to scheme to deprive Canada of excise taxes because the right to collect such taxes is property).

Because Congress modeled § 1344 on the mail- and wire-fraud statutes, the Court must presume that Congress was aware of the Court's precedent interpreting "scheme or artifice to defraud" at the time it enacted the bank-fraud statute and intended the same language to be interpreted in the same way. *See Sekhar v. United States*, 133 S. Ct. 2720, 2724 (2013) (when Congress transplants a term from another legal source, whether common law or other legislation, it presumably knows and adopts the settled meaning of that term); *see also Husky Int'l Electronics, Inc. v. Ritz*,

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core of the pre-*McNally* case law" in the courts of appeals. *Skilling*, 561 U.S. at 409 (emphasis in original). As discussed *supra* note 6, no such scheme is at issue in this case.

136 S. Ct. 1581, 1587 (2016) (no need to define "fraud" for "all times and all circumstances" where courts and legislatures have used term in a specific way for purposes of a given statutory scheme). Consistent with this precedent, the government concedes that a "scheme to defraud" a bank requires proof of an intent to deprive the bank of something of value by deception. Brief in Opposition at 11.[13] Thus, there is no reason to deviate from the settled meaning of "defraud" here. *See Hilton v. South Carolina Public Railways Comm'n*, 502 U.S. 197, 205 (1991) (stare decisis "most compelling" where "pure question of statutory construction" is involved); *see also Cleveland*, 531 U.S. at 26 (citing *Hilton* when reaffirming *McNally*'s interpretation of mail-fraud statute).

Despite this settled meaning, the Ninth Circuit affirmed Shaw's convictions under its model jury instruction defining "intent to defraud" as "intent to deceive *or* cheat." J.A. 19 (emphasis added), 49, 55; *Ninth Circuit Manual of Model Criminal Jury Instructions* § 3.16 (2010 ed.). Moreover, its model instructions have since been updated not only to reaffirm that definition but to also endorse the additional instruction given by the district court in this case that, for purposes of § 1344(1), "[t]he phrase 'scheme to defraud' means any deliberate plan of action or course of conduct by which someone intends to deceive, cheat, *or* deprive a financial institution of something of value." J.A.

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[13] The government does dispute that a defendant must intend to obtain the bank's *own* property, however. Brief in Opposition at 11. That issue is addressed below.

18 (emphasis added), 48; *Ninth Circuit Manual of Model Criminal Jury Instructions* § 8.125 (2010 ed. as updated in June 2015). Given the disjunctive language of these instructions, a jury may convict a defendant under clause (1) based solely on an intent to deceive a bank, without finding any intent to deprive that bank (or anyone else for that matter) of property. Such instructions cannot be reconciled with the plain meaning of "defraud." This error alone requires reversal of the court of appeals' judgment.

2. Because clause (1) applies the verb "defraud" to a direct object ("a financial institution"), the text requires the intent to wrong a bank in its property rights by deceiving that victim bank.

In § 1344(1), the term "defraud" is immediately followed by the phrase "a financial institution." Because defraud means wronging a victim in his property rights by deceit, the plain language of clause (1) requires an intent to wrong a victim bank *in its property rights* by deceiving that bank. The bank – not its customer – must be the intended victim of the fraudulent scheme.

One significant difference between the bank-fraud statute and its predecessors is that the mail- and wire-fraud statutes punish a scheme to defraud generally, without specifying the requisite object of the fraud. *See* 18 U.S.C. §§ 1341, 1343. The absence of a direct object

means that the mail- and wire-fraud statutes cover schemes to defraud *anyone* – whether the property owner is an individual, a public or private entity, or a financial institution – provided use of the specified instrumentality (mail or wires). Congress could have drafted § 1344 the same way, punishing a scheme to defraud anyone, provided the scheme used a bank. It did not do that.

Instead, Congress departed from the text of the mail- and wire-fraud statutes by designating the requisite object of the scheme to defraud. It limited clause (1) to frauds that target "a" – singular – "financial institution." Ordinary rules of grammar require that the direct object – "a financial institution" – be the entity that receives the action of the verb – "defraud." *See* Martha Kolln, *Understanding English Grammar* 396 (4th ed. 1994) ("The direct object names the objective or goal or the receiver of the verb's action[.]"); Robert Funk et al., *The Elements of Grammar for Writers* 115 (1991) ("direct object" is noun that receives verb's action). Consequently, to come within the sweep of clause (1), the subject (the defendant) must do the verb (defraud) *to the direct object* (a bank). *See Flora v. United States*, 362 U.S. 145, 150 (1960) (ordinary principles of English grammar are relevant when interpreting a statute).

Because the settled meaning of "defraud" is wronging a victim in his property rights by deceit, a scheme "to defraud *a financial institution*" is, by extension, a scheme to obtain a bank's *own* property by deceiving that victim bank. Therefore, a defendant has

the intent "to defraud a financial institution" only if his intended victim is a financial institution *itself*. Reading clause (1) to include schemes designed to obtain a bank *customer's* property rather than a bank's *own* property deviates from the statute's plain text and ordinary syntax, which requires the verb to act upon the direct object. *See Department of Housing and Urban Development v. Rucker*, 535 U.S. 125, 131 (2002) (rejecting interpretation of statute that ran counter to basic grammar rules).

When construing similar statutory language, this Court has repeatedly recognized the legal significance of Congress's decision to specify textually the object of the fraudulent scheme, requiring that the scheme alleged in fact target the specified victim's property. In other words, the intended fraud must be *against* the specified object. *See Bridges v. United States*, 346 U.S. 209, 221-22 (1953) (Wartime Suspension of Limitations Act applied only to offenses "defrauding or attempting to defraud the United States" – that is, "where fraud *against* the Government is an essential ingredient of the crime[,]" not merely where its effect was to cause the government loss) (emphasis added).

Thus, in *Tanner v. United States*, 483 U.S. 107 (1987), the Court held that defendants who conspired to defraud a private entity which received federal funding and was supervised by the government did not violate 18 U.S.C. § 371, which punishes conspiracies "to defraud the United States in any manner or for any purpose[.]" *Id.* at 128-32. The government had alleged a conspiracy to defraud the United States by impeding

the lawful functions of the government agency that supervised the private entity,[14] but argued on appeal that the private entity should be treated as "the United States" itself under these circumstances. *Id.* The Court rejected this interpretation as lacking "even an arguable basis in the plain language of § 371." *Id.* at 131. The government's construction, the Court explained, would have substituted the statutory language requiring that the object of the fraud be "the United States" with the phrase "anyone receiving federal financial assistance and supervision[.]" *Id.* at 132 (internal quotation marks omitted). In so holding, the Court emphasized that the conspiracies covered by § 371 "are defined not only by the nature of the injury intended by the conspiracy, and the method used to effectuate the conspiracy, but also – and most importantly – by the *target* of the conspiracy." *Id.* at 130 (emphasis in original). Thus, the convictions could stand only if the trial evidence established that the defendants conspired to make misrepresentations *to the United States* because such proof would establish that the United States *itself* – and not the private entity – was the target of the fraud. *Id.* at 132.[15]

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[14] As discussed *supra* note 11, the Court had previously interpreted § 371's statutory language to reach conspiracies that impair, obstruct, or defeat the lawful function of government, and the Court did not reconsider that aspect of § 371's scope in *Tanner*. *Id.* at 128.

[15] The government also charged the defendants with mail fraud for the scheme to defraud the private entity. *Id.* at 133. Because the mail-fraud statute punishes schemes to defraud *anyone*,

Over half-a-century earlier, the Court came to a similar conclusion in *United States v. Cohn*, when considering the scope of a statute that prohibited *inter alia* falsifying or concealing a material fact by any scheme "for the purpose and with the intent of cheating and swindling or *defrauding the Government of the United States*[.]" 270 U.S. at 343 (internal quotation marks omitted) (emphasis added). There, the government alleged that the defendant lied to U.S. customs officials (via brokers) and concealed material facts in order to fraudulently procure cigars that had arrived from abroad. *Id.* at 343-44. The cigars were admissible to the United States free of duty, although government regulations required that the defendant pay the third-party sellers for the merchandise before taking possession from the custom house. *Id.* at 344-45. Applying the "usual and primary" meaning of "defraud" as to cheat "out of property or money," the Court held that the statute related to the "fraudulent causing of pecuniary or property loss" to the United States. *Id.* at 346-47.[16] Because the merchandise was non-dutiable, the defendant's scheme did not constitute "defrauding" *the United States* within the meaning of the statute, even

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this theory of prosecution dispensed with proof that the target of the fraud was the United States (rather than the private entity).

[16] In so holding, the Court rejected the government's position that the statute should be construed, in accordance with 18 U.S.C. § 371, *see supra* note 11, to include not only the "primary" meaning of defraud the United States, but also in the "secondary sense" of interfering with or obstructing lawful government functions. *Id.*

though the defendant did not pay the third-party sellers. *Id.* at 346.

Finally, in *Allison Engine Co., Inc. v. United States ex rel. Sanders*, 553 U.S. 662 (2008), the Court construed a provision of the False Claims Act, which prohibits conspiracies "to defraud *the Government* by getting a false or fraudulent claim allowed or paid." *Id.* at 672 (internal quotation marks omitted) (emphasis added). There, the plaintiffs brought *qui tam* actions under the Act, alleging fraud in the invoices subcontractors submitted for payment to private-entity shipyards, which had in turn contracted with the Navy to build destroyers. *Id.* at 665-67 The Court held that it was not enough for the plaintiffs to show that the subcontractors agreed upon a fraudulent scheme that "had the effect" of causing the shipyards to make payments to them using money obtained from the government pursuant to the contract. *Id.* at 672. Rather, the plaintiffs had to "show[] that the conspirators intended to defraud *the Government*" itself – not merely the third-party shipyards who paid the claims with government funds. *Id.* (internal quotation marks omitted) (emphasis added).

In each of these cases, the Court construed statutory language designating the victim of the conspiracy to defraud to require that the scheme target that victim *itself*, and not a third party. That the third-party-owned property targeted by the fraud in *Cohn* was in the government's custody did not convert the offense into a scheme to defraud *the government*. Likewise, that the third-party entity targeted by the fraud in *Allison Engine* made payments using the government's

money did not transform the offense into a scheme to defraud *the government*. The same analysis applies here. As in *Tanner*, the offenses covered by clause (1) of § 1344 "are defined . by the *target*" of the scheme: the bank. *See* 483 U.S. at 130 (emphasis in original). Put differently, the contemplated fraud must be *against* the bank. *Cf. Bridges*, 346 U.S. at 222. Thus, for purposes of clause (1), the intended target cannot be a non-bank third party. That a bank holds its customer's property in its "custody or control" does not transform a scheme that targets this bank-*held* property into a scheme to defraud *the bank*. The distinction between the bank *itself* – the designated object of the scheme – and its third-party customer does not dissolve because the bank maintains "custody or control" over its customer's money.

The plain language of clause (1) thus reaches only schemes that target "a financial institution" as the intended victim of the fraud. Given the settled meaning of "defraud," the defendant must therefore intend to obtain the bank's own property by deceit of that bank. Extending the statutory text to cover a financial institution's *customers* exceeds the unambiguous scope of the statute.

In this respect, too, the Ninth Circuit's decision rested on an interpretation of clause (1) that conflicts with its plain meaning. It held that "§ 1344(1)'s element of intent 'to defraud' . . does not include an intent to financially victimize the bank." J.A. 43, 51-55. Contrary to this conclusion, clause (1) itself establishes

that a *bank* is the required victim and that a defendant therefore cannot intend to "defraud" a bank without intending to wrong a bank in its own property rights.

B. The structure of § 1344 – which contains two clauses defining different crimes and distinguishes in clause (2) between two kinds of property – supports the plain-meaning interpretation of clause (1).

Section 1344's structure confirms that clause (1) requires the intent to obtain a bank's *own* property, and not its customer's. *See Sturgeon v. Frost*, 136 S. Ct. 1061, 1070 (2016) (statute's language cannot be construed in a vacuum; its words must be read in context and in light of their place in the overall statutory scheme).

As explained in the preceding section, § 1344(1) makes "a financial institution" the object of the verb "defraud," unlike the mail- and wire-fraud statutes on which it was modeled. But there is also an important structural difference between the bank-fraud statute and its predecessors. The bank-fraud statute defines two crimes in separate clauses, while the wire- and mail-fraud statutes define a single crime comprised of two phrases (schemes to defraud *and* to obtain money

or property by false pretenses) set forth in one sentence.[17] *Loughrin*, 134 S. Ct. at 2391. Whereas the second money-or-property phrase in the mail- and wire-fraud statutes merely clarifies that the first scheme-to-defraud phrase includes certain conduct, the bank-fraud statute's second clause is a structurally-separate provision which is on "equal footing" with clause (1) and does "independent work." *See id.* The result is that the mail- and wire-fraud statutes punish the "scheme to defraud" using specified means, while the bank-fraud statute punishes schemes (1) "to defraud a financial institution," and separately, (2) to obtain property *either* "owned by" *or* "in the custody or control of" a financial institution "by means of" a false representation.

The textual differences between § 1344's two distinct provisions support the plain-meaning construction of clause (1). In clause (2), Congress distinguished between schemes that target bank-owned property and those that target bank-held property, thereby acknowledging the material difference between the two types of schemes – a scheme to obtain property "owned by" a bank is not a scheme to obtain property "in the custody or control of" a bank. As the Court noted in *Loughrin*, clause (2) extends its reach to both, making express the provision's broad applicability to a wide

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[17] These statutes punish "[w]hoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises" uses the mail or wires "for the purpose of executing such scheme or artifice[.]" *See* 18 U.S.C. §§ 1341, 1343.

range of property interests present in banking relationships. 134 S. Ct. at 2395 n.9 (noting "the broad language in § 1344(2) describing the property at issue"). Although the Court used shorthand to describe the two kinds of property covered by clause (2) collectively as "bank property," it recognized that a defendant who targets money in a customer's account intends to obtain property under the "custody or control" of the bank. *Id.* at 2389, 2392. It follows that such a defendant does not intend to obtain property "owned by" the bank.

Clause (2) demonstrates that Congress not only recognized the distinction between schemes that target bank-owned property and those that target bank-held property, but also that it knew how to draft a statute that was broad enough to reach both. Clause (1) is devoid of clause (2)'s breadth. Had Congress intended clause (1) to apply to schemes that target bank-held as well as bank-owned property, it would have drafted clause (1) to mirror clause (2) in this respect, punishing schemes to obtain money or property "owned by" or "in the custody or control" of a financial institution by deceiving the bank. It did not do that. In the context of clause (2), Congress's choice is significant. *See Loughrin*, 134 S. Ct. at 2390 (when § 1344 uses particular language in one clause but not the other, Congress is presumed to intend a difference in meaning).

In drafting clause (1), Congress chose to use the phrase "defraud a financial institution." It thereby imported into the statute the established definition of "defraud" and departed from the mail- and wire-fraud

statutes to designate "a financial institution" as the requisite object of the fraud. Construing clause (1) to extend to bank-held as well as bank-owned property would effectively substitute the statutory language requiring that the intended victim of the scheme be "a financial institution" with the phrase "a financial institution or its *customer*." *Cf. Tanner*, 483 U.S. at 132. No basis exists for construing clause (1)'s unambiguous text to include schemes to obtain bank-held as well as bank-owned property, as explicitly differentiated in, and covered by, clause (2).

As discussed further below, *see infra* Part II, when the statute's two provisions are properly construed, § 1344 constitutes a "symmetrical and coherent regulatory scheme[.]" *See FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) (internal quotation marks omitted). Clause (2) dispenses with clause (1)'s intent-to-defraud-a-bank requirement, reaching any scheme to obtain bank-held *or* bank-owned property (provided the requisite means). Clause (1) dispenses with clause (2)'s false-statement requirement, reaching any scheme to obtain bank-owned property by deceiving that bank. In this way, the two parts fit "into an harmonious whole," working together to provide a comprehensive sweep for the statute. *See id.* (internal quotation marks omitted).

C. The legislative history of § 1344 also supports the plain-meaning interpretation of clause (1).

Where, as here, the text of the statute is unambiguous and the statutory scheme is "coherent and consistent," the Court's inquiry should go no further. *Sebelius v. Cloer*, 133 S. Ct. 1886, 1895 (2013) (internal quotation marks omitted). It must simply interpret the statute in accordance with its plain meaning. *Id.* at 1895-96. The Court therefore need not delve into § 1344's legislative history. *United States v. Woods*, 134 S. Ct. 557, 567 n.5 (2013) (regardless of whether legislative history is ever relevant, it need not be consulted when statutory text is clear); *Ratzlaf v. United States*, 510 U.S. 135, 147-48 (1994) (the Court does not "resort to legislative history to cloud a statutory text that is clear"). If the Court does so, however, it will find that the background of the statute and legislative pronouncements about its purpose support reading clause (1) to cover only schemes designed to take bank-owned property by deceiving that bank.

1. Congress enacted the bank-fraud statute to fill specific gaps in legislation, and the plain-meaning interpretation of clause (1), coupled with the Court's prior interpretation of clause (2), achieves that purpose.

Congress enacted § 1344 in the wake of three decisions of this Court that exposed particular "gap[s] . . . in Federal jurisdiction over frauds against banks[.]"

S. Rep. No. 98-225, at 377-78 (1983) ("*Senate Report*"); *see also* H.R. Rep. No. 98-901, at 2-3 (1984) ("*House Report*"); *Loughrin*, 134 S. Ct. at 2391-92. The bank-fraud offenses of particular concern to Congress when it drafted § 1344 map onto clause (1), as interpreted herein based on its plain language, and clause (2), as interpreted by *Loughrin*.

Until the Court's decision in *United States v. Maze*, 414 U.S. 395 (1974), the government used the mail-fraud statute to prosecute schemes involving banks. *Senate Report* at 377; *House Report* at 2-3; *Loughrin*, 134 S. Ct at 2391-92. *Maze* affirmed the lower court's reversal of a § 1341 conviction where the defendant stole a third party's credit card and used it to obtain food and lodging. 414 U.S. at 396-97. To satisfy § 1341's mailing element, the government relied on post-purchase mailings between the merchants and the issuing bank. *Id.* at 396-97, 399. The Court held that these mailings were "directed to the end of adjusting accounts between" the parties that shouldered the loss of the scheme (namely, the third-party account holder, the motel proprietor, and the bank), but were not for the purpose of executing the scheme, as required by the mail-fraud statute. *Id.* at 402, 405. The Court reasoned that the defendant's only objective was to pay the bills using the third party's stolen credit card; his scheme thus "reached fruition when he checked out of the motel[.]" *Id.* at 402. There was no evidence that the defendant intended that the bank (as opposed to the bank customer) ultimately bear the loss – "[i]ndeed,

from his point of view, *he probably would have preferred to have the invoices . . . never mailed at all.*" *Id.* (emphasis added). *Maze* limited the use of the mail-fraud statute to prosecute bank fraud. *Senate Report* at 377-78; *House Report* at 3.

The government also relied on 18 U.S.C. § 1014, as an "alternative" to the mail-fraud statute, to prosecute a subset of bank schemes involving false statements. *Senate Report* at 378. That theory of prosecution ended, as to check-kiting schemes, with *Williams v. United States*, 458 U.S. 279 (1982). Section 1014 prohibits "'knowingly mak[ing] any false statement or report'" for the purpose of influencing the specified actions of a bank. *Id.* at 282 (quoting 18 U.S.C. § 1014). Although check kiting is directed at misleading banks to honor insufficient-fund checks, *Williams* held that § 1014 does not apply because such schemes do not involve the making of a "false statement." *Id.* at 280-82, 284. Technically, the Court reasoned, a check is not a factual assertion at all, and therefore cannot be characterized as "true" or "false." *Id.* at 284.

As a result of *Williams*, § 1014 could "no longer be applied to address one of the most pervasive forms of bank fraud, check kiting." *Senate Report* at 378; *see also House Report* at 2. Because of the crime's "magnitude," and the fact that *Williams* and *Maze* meant that the government "frequently encounter[ed] major check kiting schemes where there [was] no way to apply any federal criminal statute[,]" check kiting presented a major concern for the Department of Justice. *See*

Financial Bribery and Fraud: Hearing Before the Subcomm. on Crim. Justice of the House Comm. on the Judiciary, 98th Cong., 2d Sess. 4, 12 (1984) (testimony and statement of Victoria Toensing, Deputy Assistant Attorney General, Criminal Division).

Soon after *Williams*, the Court further restricted the options available to the government to prosecute crimes against banks. *Bell v. United States*, 462 U.S. 356 (1983), affirmed a bank-larceny conviction, 18 U.S.C. § 2113(b), based on a scheme in which the defendant opened a bank account with false identifying information, deposited a third party's stolen and altered check into the account, and withdrew the funds. *Id.* at 357-58. Section 2113(b) punishes "[w]hoever takes and carries away, with intent to steal or purloin," property "belonging to, or in the care, custody, control, management or possession" of a bank. *Id.* at 357-58 (internal quotation marks omitted). The Court held that bank larceny applied to offenses that obtained property from banks by false pretenses and not just common-law larceny – but only if the conduct involved "a taking and carrying away" of that property. *Id.* at 361.

After *Bell*, there was "an absence of coverage with respect to some types of fraud in the general bank theft statute . in which there is not a taking and carrying away[.]" *Senate Report* at 378 (internal quotation marks omitted); *see also House Report* at 2. Congress responded the following year with § 1344, clause (2) of which, like § 2113(b), distinguishes between bank-owned and bank-held property. *Compare* 18 U.S.C. § 2113(b) *with* 18 U.S.C. § 1344(2).

Under the bank-fraud statute, the false-statement fraud in *Bell* is covered most clearly by clause (2), irrespective of whether the scheme involves a completed "taking." *See Loughrin*, 134 S. Ct. at 2393 (clause (2) satisfied "most clearly" where defendant makes misrepresentation directly to bank). The stolen-credit-card scheme in *Maze* is, likewise, covered by clause (2), even though the mailings post-date the scheme. *See id.* at 2391-92 (comparing Loughrin's scheme to scheme in *Maze*). And the check-kiting scheme in *Williams* is covered by clause (1), notwithstanding that a check is not a false statement.

Indeed, following § 1344's enactment, check kiting became the quintessential clause (1) offense. *See Loughrin*, 134 S. Ct. at 2390 n.4. It is consistent with Congress's particular focus on check-kiting schemes – which mislead banks to obtain their property – that it devoted clause (1) to the protection of banks from schemes in which the bank itself (and not a third party) is the intended victim of the fraud.

2. Legislative pronouncements about the intended sweep of § 1344 are consistent with the plain-meaning interpretation.

Although the legislative history does not discuss the contemplated boundaries of each clause of § 1344, it evidences the intent to model the statute on its mail- and wire-fraud predecessors, and to incorporate this

Court's interpretation of the phrase "scheme to defraud," as well as the courts of appeals' pre-*McNally* disjunctive interpretation of those statutes to encompass two provisions with distinct sweeps. *See, e.g.*, *House Report* at 4 ("The section thus parallels the language of the current mail fraud and wire fraud statute ('scheme to defraud'), *and is intended to incorporate case law interpretations of those sections.*") (emphasis added); *Senate Report* at 378 (statute "modeled" on mail- and wire-fraud statutes as then "construed by the courts"); *Loughrin*, 134 S. Ct. at 2391 (timing of § 1344's enactment reflects that Congress adopted pre-*McNally* interpretation of relevant language).

Legislative pronouncements also reflect that the purpose of the statute was to protect banks from schemes in which the bank *itself* is the financial victim of the fraud. *See, e.g.*, *Senate Report* at 377 ("frauds against banks" implicate "a strong Federal interest in protecting *the financial integrity* of these institutions") (emphasis added); *House Report* at 2 (existing laws did "not extend to fraudulent schemes where banks are victims unless the specific elements of false statement or theft crimes are met"). It is consistent with this focus on banks as the financial "victims" of crime that Congress devoted clause (1) to the protection of banks from schemes that aim to obtain the bank's *own* property by deceiving that bank. This is particularly so given clause (2)'s different, "broad language . describing the property at issue[,]" *Loughrin*, 134 S. Ct. at 2395 n.9, which dispenses with the need to determine if the scheme was designed to obtain bank-owned

or bank-held property, just as clause (1) dispenses with the need to prove that a defendant's false statement was the mechanism inducing the bank to release money. Construed accordingly, the two provisions work in tandem to ensure that the statute "reach[es] a wide range of fraudulent activity[,]" like the mail- and wire-fraud statutes on which it was modeled. *See Senate Report* at 378.

Given this history, no basis exists for departing from the plain meaning of § 1344's text. *See Salinas v. United States*, 522 U.S. 52, 57 (1997) (only "most extraordinary showing of contrary intentions in legislative history will justify a departure from" plain meaning of statute) (internal quotation marks omitted).

D. If doubt remains, the Court should construe clause (1) in favor of lenity, as it has done with other fraud statutes.

Even if clause (1) is susceptible to a more expansive interpretation, any ambiguity concerning its scope should be resolved in favor of lenity. *See Cleveland*, 531 U.S. at 25; *see also United States v. Santos*, 553 U.S. 507, 514 (2008) (plurality opinion) (rule of lenity required adopting "more defendant-friendly" of two plausible definitions).

Lenity is "especially appropriate" in construing the bank-fraud statute because § 1344 not only authorizes a maximum penalty of 30 years, but is also a predicate offense for other serious crimes (like its mail- and

wire-fraud predecessors). *See Cleveland*, 531 U.S. at 25 (mail fraud is a predicate for RICO, 18 U.S.C. § 1961(1), and the money-laundering statute, 18 U.S.C. § 1956(c)(7)(A)); *see also* 18 U.S.C. § 1028A(c)(5) (bank fraud is a predicate for aggravated identity theft, which has a two-year mandatory-minimum term).

Applying the rule of lenity, the Court has repeatedly chosen narrow interpretations when construing the federal fraud statutes. *See, e.g.*, *Skilling*, 561 U.S. at 410-11; *Cleveland*, 531 U.S. at 25; *McNally*, 483 U.S. at 360. It should take the same approach here. "If Congress desires to go further" and punish, under clause (1), schemes that aim only to deceive a bank, or those that aim to deceive a bank to obtain bank-held (rather than bank-owned) property, "it must speak more clearly than it has." *McNally*, 483 U.S. at 360.

II. Given the plain-meaning interpretation, any conduct that amounts to bank fraud will be chargeable, and provable, under clause (1), clause (2), or both.

For the foregoing reasons, clause (1) applies only to schemes to obtain bank-owned property by deceiving that bank, and clause (2) covers schemes to obtain bank-held or bank-owned property by means of a false statement. So construed, § 1344 is true to its text, structure, and history. It is also comprehensive in its reach. The two provisions work together to ensure that any scheme properly characterized as bank fraud will be chargeable, and provable, under the statute.

In *Loughrin*, the Court recognized that there is substantial overlap between § 1344's two clauses. 134 S. Ct. at 2390 n.4. Therefore, many bank-fraud crimes may support a conviction under either clause. If a defendant intends to obtain bank-owned property by deceiving that bank, and does so by means of a false statement to the bank, then he both defrauded a financial institution for purposes of clause (1) and engaged in conduct falling within the plain meaning of clause (2). Thus, in *United States v. Higgins*, 270 F.3d 1070 (7th Cir. 2001), the defendant presented a bad check to a bank along with an "elaborate tale" designed to obtain immediate credit without waiting for the check to clear. *Id.* at 1074. The court concluded that these facts were sufficient to support a conviction under either clause (1) or clause (2). *Id.*

There are cases that can only be brought under clause (1), however. For example, check kiting cannot be charged under clause (2) because such schemes do not involve false representations. *Loughrin*, 134 S. Ct. at 2390 n.4; *Williams*, 458 U.S. at 284. But these cases may be prosecuted under clause (1) because check-kiting schemes unambiguously target a bank and not a non-bank third party. Consequently, the scheme itself constitutes powerful circumstantial evidence of a defendant's *intent* to obtain bank-owned property. The reasonable inference, absent contrary evidence, is that the defendant intended to target *the bank's* property because that is what his scheme was designed to do.

Williams illustrates the point. There, the defendant executed a classic check-kiting scheme by engaging in a series of transactions to obtain bank-owned property. *Williams*, 458 U.S. at 280-82. First, he drew a check in excess of his account balance in one bank and deposited it in his account in the other; then he reversed the process between his accounts in order to mislead the banks into honoring the bad checks. *Id.* Given the design of the scheme, in which banks were the unambiguous targets, the Court did not question that the defendant acted with the intent to obtain the banks' money because his conduct was clearly directed at misleading the banks for that purpose. *Id.* at 300 (Marshall, J., dissenting) (describing majority decision).

The same analysis applies to other schemes that unambiguously target bank-owned property. For example, although loan fraud is often prosecuted under 18 U.S.C. § 1014, the government has secured loan-fraud convictions under clause (1). *See, e.g.*, *United States v. Rizk*, 660 F.3d 1125, 1127-28, 1135-36 (9th Cir. 2011) (defendant presented inflated appraisals to banks to obtain bank loans and was convicted under both § 1014 and § 1344(1)). Similarly, although bank embezzlement is covered by 18 U.S.C. § 656, it can also be prosecuted under clause (1). *See, e.g.*, *United States v. Severson*, 569 F.3d 683, 685-89 (7th Cir. 2009) (defendant conspired with bank president to take bank property and was charged under § 656 as well as § 1344(1) and § 1344(2)). In such cases, as with check

kiting, the intent to defraud a bank will be clear because a scheme to commit loan fraud or embezzlement is directed at a bank's own property. *See Agnew v. United States*, 165 U.S. 36, 50 (1897) (bank embezzlement created inference that defendant had the intent to defraud the bank).

In contrast, where a scheme targets bank-*held* property but does not reflect an intent to obtain bank-*owned* property, clause (2) provides an avenue of prosecution that dispenses with the need to prove such intent. For example, in *Maze*, the defendant targeted bank-held property by using his roommate's stolen credit card. 414 U.S. at 396-97. The scheme caused loss to a bank (as well as to the third-party merchants and the roommate) but contained "no indication" that the defendant's *objective* was to obtain bank-owned property. *Id.* at 402. In fact, the Court found the evidence to be to the contrary insofar as the defendant "probably would have preferred" that the merchants never mailed the invoices to the bank. *Id.* If the government proceeds under clause (2) in such a case, it does not have to prove the intent to defraud a bank. For this reason, schemes directed at bank-*held* property (like money in a bank customer's account) are often charged, and successfully proved, under that clause. *See, e.g.*, *Loughrin*, 134 S. Ct. at 2389 n.3 (noting that jury rejected defendant's argument that once he obtained cash from Target, using altered checks, he was "indifferent" to whether bank paid it and thus did not act with requisite intent to obtain bank-held money); *United States v. McNeil*, 320 F.3d 1034, 1037-40 (9th

Cir. 2003) (defendant's conduct "well within" scope of clause (2) where he misrepresented himself to bank in order to obtain third-party's tax refund).

That was not the approach taken here, however. Shaw misrepresented himself to the bank in order to take bank customer Stanley Hsu's money from his account. *See supra* Statement of the Case. As in *Maze*, there was "no indication" that Shaw intended to obtain bank-owned property (nor, by contrast to *Maze*, did he actually do so). *See Maze*, 414 U.S. at 402. When a defendant targets the money in a bank customer's account, that is, by default, a scheme to obtain property under the "custody or control" of the bank within the meaning of clause (2). *Loughrin*, 134 S. Ct. at 2392 (describing a scheme to obtain "the money in the victim's checking account" as a scheme to obtain property "under the custody or control of" the bank). It is not a scheme to target property "owned by" the bank, absent contrary evidence of intent. Indeed, schemes, like Shaw's, that aim to obtain bank-held property by means of a false representation to the bank are the paradigmatic clause (2) case. *Id.* at 2393 (clause (2)'s "by means of" language is satisfied "most clearly" when defendant makes misrepresentation to bank itself). Had the government prosecuted this case under clause (2) – the appropriate course where evidence of intent to defraud a bank is ambiguous, remote, or absent – it would have avoided clause (1)'s intent-to-defraud-a-bank element

altogether.[18] So charged, the government's task would have been straightforward.[19]

Given the comprehensive sweep of the statute's two clauses, any true bank-fraud scheme will be covered by § 1344. Where the alleged conduct is covered by both clauses, the government may proceed under

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[18] It also would have avoided this element by proceeding under the wire-fraud statute, which captures schemes to defraud *anyone*. 18 U.S.C. § 1343. Indeed, the mail- and wire-fraud statutes include provisions establishing heightened penalties for frauds that "affect[] a financial institution," such that the penalties match those in § 1344. *See* 18 U.S.C. §§ 1341, 1343. These provisions reflect Congress's understanding that the government would continue to use the mail- and wire-fraud statutes to prosecute frauds against banks, in appropriate cases, despite § 1344.

[19] That Shaw has not contested that he could be charged under clause (2) does not render the proper interpretation of clause (1) insignificant to defendants in general or to him in particular. The Court has held that the two clauses define separate crimes with different elements. *Loughrin*, 134 S. Ct. at 2388-92. And due process requires the government to prove beyond a reasonable doubt every element of a charged crime. *In re Winship*, 397 U.S. 358, 364 (1970). This constitutional burden of proof "plays a vital role in the American scheme of criminal procedure" because it is "a prime instrument for reducing the risk of convictions resting on factual error" and it "provides concrete substance for the presumption of innocence[.]" *Id.* at 363; *see also Clark v. Arizona*, 548 U.S. 735, 766 (2006) (applying presumption of innocence and burden of proof beyond a reasonable doubt to mens rea). It follows that any alleged bank fraud must be charged under the appropriate clause(s) of § 1344 to ensure that a jury is presented with the proper elements by which to judge the defendant's conduct. Shaw may have acted improperly, "[b]ut bad men, like good men, are entitled to be tried and sentenced in accordance with law." *Sorich v. United States*, 555 U.S. 1204, 1311 (2009) (Scalia, J., dissenting from denial of certiorari) (internal quotation marks omitted).

either or both (in separate counts). But where the conduct only supports a bank-fraud conviction under *one* of the clauses, the government must proceed under the applicable provision. If the government makes proper charging decisions – invoking the appropriate clause(s) given the conduct at issue – it should have no problem proving the requisite intent where it exists. But where, as here, the government tries to force a square peg into a round hole by charging what is a clause (2) scheme under clause (1), it *invites* a higher evidentiary burden and any consequent difficulty in meeting the requisite standard. Given the availability of clause (2), there is no need to stretch clause (1) beyond its plain meaning – even if the Court were permitted do that.

CONCLUSION

For the foregoing reasons, the Court should reverse the judgment of the court of appeals and remand the case for proceedings consistent with its opinion.

Respectfully submitted,

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